

The inability-to-pay defense emerged from a series of SEC decisions that require FINRA to consider the defense in disciplinary cases (as opposed to expedited actions), including disciplinary cases involving failures to pay arbitration awards and restitution.<sup>11</sup> The legal underpinnings that support the inability-to-pay defense in disciplinary cases are not, however, present in the expedited proceedings context. The aforementioned SEC decisions largely rely on the “excessive and oppressive” language in Section 19(e) of the Exchange Act in requiring FINRA to consider inability-to-pay. Section 19(e) of the Exchange Act provides authority to the SEC to review and affirm, modify or set aside any final disciplinary sanctions imposed by FINRA on its members. Section 19(e), however, does not apply to expedited proceedings. Expedited proceedings are reviewed under Exchange Act Section 19(f), which requires that “the specific grounds” on which FINRA based its action “exist in fact,” that FINRA followed its rules, and that those rules are consistent with the Act. The different focus of these two standards and the more limited review for expedited actions are understandable and support eliminating the inability-to-pay defense in expedited actions.<sup>12</sup>

debtor's financial condition, and possible criminal prosecution for intentionally inaccurate disclosures, among other aspects, distinguish bankruptcy from inability-to-pay.

<sup>11</sup> See *Toney L. Reed*, 52 S.E.C. 944 (1996), *recons. denied*, Securities Exchange Act Release No. 39354 (Nov. 25, 1997); *Bruce M. Zipper*, 51 S.E.C. 928 (1993). In addition, the SEC had previously recognized that a bona fide inability-to-pay an arbitration award is an important consideration in determining whether any sanction for failing to pay an arbitration award is “excessive or oppressive.” See Securities Exchange Act Release No. 40026 (May 26, 1998), 63 FR 30789 (June 5, 1998). (Without further discussion, the order cited the SEC's decision in *Zipper*, which was a disciplinary case, not an expedited action.)

<sup>12</sup> In *William J. Gallagher*, Securities Exchange Act Release No. 47501 (March 14, 2003), the SEC emphasized that expedited actions are reviewed under Section 19(f) of the Act not Section 19(e). The SEC stated, “Gallagher misconstrues the applicable review standard when he argues that [FINRA's] sanction is ‘excessive and oppressive’ and that [FINRA's] indefinite suspension order is inconsistent with the [FINRA] Sanction Guidelines, standards relevant in the Commission's review of [FINRA] disciplinary proceedings under Section 19(e) of the Exchange Act.” *Id.* at \*6. The SEC explained that its review is limited to analyzing whether “the specific ground on which [FINRA] based its suspension—failure to pay in full an arbitration award—‘exists in fact[,]’” the “SRO's determination was in accordance with its rules, and \* \* \* those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.” *Id.* at \*5 & \*7. In *Gallagher*, FINRA and the SEC rejected the respondent's claim of inability-to-pay on factual grounds. The issue of whether a respondent was permitted to raise the defense as a matter of law was neither raised nor decided.

Unlike in disciplinary cases, FINRA is not imposing a monetary sanction in these expedited actions; it is suspending a respondent for failing to pay a previously imposed arbitration award. There also is an explicit procedural mechanism built into these expedited actions that allows a suspension to be lifted once respondents satisfy any of the four defenses listed above. The main goal is to encourage respondents to comply with the law or previously imposed orders, not to sanction them for past misconduct.

In sum, members and associated persons that fail to pay arbitration awards to customers should not be allowed to remain in the securities industry by relying on the inability-to-pay defense in expedited actions. This is especially true because they can avoid regulatory action by paying the award, reaching a settlement with the customers (which can include payment plans), moving to vacate the award, or filing for bankruptcy. Three commenters addressed the proposed rule change and all three urged the Commission to approve it.<sup>13</sup>

## II. Discussion and Commission Findings

After careful review, the Commission finds the proposed rule change to be consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.<sup>14</sup> In particular, the Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>15</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest. The proposal also is consistent with Section 15A(b)(7) of the Act,<sup>16</sup> which provides that FINRA must take appropriate action when members and associated persons violate provisions of the Act or FINRA rules.

The Commission believes that the proposed rule change will further

<sup>13</sup> In its comment, PIABA also recommended that FINRA eliminate or restrict the bankruptcy defense in expedited proceedings. Those suggestions are outside the scope of the current proposed rule change.

<sup>14</sup> In approving the proposed rule change, the Commission has considered the rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>15</sup> 15 U.S.C. 78o-3(b)(6).

<sup>16</sup> 15 U.S.C. 78o-3(b)(7).

FINRA's investor protection mandate by promoting a fair and efficient process for taking action to encourage members and associated persons to pay arbitration awards to customers. The Commission also believes that the proposed rule change will further FINRA's statutory obligation to take appropriate action when members and associated persons violate provisions of the Act or FINRA rules.

## III. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities association.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>17</sup> that the proposed rule change (SR-FINRA-2010-0014) be and hereby is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-62207; File No. SR-ISE-2010-55]

### Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amending the Direct Edge ECN Fee Schedule

June 2, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on May 28, 2010, the International Securities Exchange, LLC (the “Exchange” or the “ISE”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

<sup>1</sup> 15 U.S.C. 78s(b)(2).

<sup>18</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

## I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Direct Edge ECN's ("DECN") fee schedule for ISE Members<sup>3</sup> to pass through rebates/fees from other market centers. All of the changes described herein are applicable to ISE Members.

The text of the proposed rule change is available on the Exchange's Internet Web site at <http://www.ise.com>, on the Commission's Internet Web site at <http://www.sec.gov>, at ISE, and at the Commission's Public Reference Room.

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

#### 1. Purpose

DECN, a facility of ISE, operates two trading platforms, EDGX and EDGA.<sup>4</sup>

On May 1, 2010,<sup>5</sup> the Exchange amended the fees for orders that either route or re-route to the NYSE in response to an increase in NYSE's fee for removing liquidity to \$0.0021 per share (from \$0.0018 per share). As part of that amendment, the "Q" flag, which denotes an order type (ROUC) that routes to the NYSE, was increased from \$0.0015 per share to \$0.0018 per share on EDGA and EDGX to reflect the increase. To more closely reflect the costs of removing liquidity from the NYSE, the "Q" flag is now proposed to

be further increased from \$0.0018 to \$0.0020 per share.

The changes discussed in this filing will become operative on June 1, 2010.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,<sup>6</sup> in general, and furthers the objectives of Section 6(b)(4),<sup>7</sup> in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. ISE notes that DECEN operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a competitive pricing structure designed to incent market participants to direct their order flow to DECEN. ISE believes the fees and credits remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to those members that opt to direct orders to DECEN rather than competing venues.

### B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3) of the Act<sup>8</sup> and Rule 19b-4(f)(2)<sup>9</sup> thereunder. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-ISE-2010-55 on the subject line.

### Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-ISE-2010-55. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ISE-2010-55 and should be submitted on or before June 29, 2010.

<sup>3</sup> References to ISE Members in this filing refer to DECEN Subscribers who are ISE Members.

<sup>4</sup> This fee filing relates to the trading facility operated by ISE and not EDGA Exchange, Inc. and EDGX Exchange, Inc. Direct Edge ECN LLC (EDGA and EDGX) will cease to operate in its capacity as an electronic communications network following the commencement of operations of EDGA Exchange, Inc. and EDGX Exchange, Inc. as national securities exchanges.

<sup>5</sup> See Securities Exchange Act Release No. 62050 (May 6, 2010), 75 FR 27029 (May 13, 2010) (SR-ISE-2010-37).

<sup>6</sup> 15 U.S.C. 78f.

<sup>7</sup> 15 U.S.C. 78f(b)(4).

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A). [sic]

<sup>9</sup> 17 CFR 19b-4(f)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-62206; File No. SR-ISE-2010-56]

### Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Order Granting Accelerated Approval to a Proposed Rule Change Relating to the Amounts That Direct Edge ECN, in Its Capacity as an Introducing Broker for Non-ISE Members, Passes Through to Such Non-ISE Members

June 2, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on May 28, 2010, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is approving the proposal on an accelerated basis.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the amounts that Direct Edge ECN ("DECN"), in its capacity as an introducing broker for non-ISE Members, passes through to such non-ISE Members.

The text of the proposed rule change is available on the Exchange's Internet Web site at

<http://www.ise.com>, on the Commission's Internet Web site at <http://www.sec.gov>, at ISE, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

DECN, a facility of ISE, operates two trading platforms, EDGX and EDGA.<sup>3</sup> On May xx, [sic] 2010, the ISE filed for immediate effectiveness a proposed rule change to amend Direct Edge ECN's ("DECN") fee schedule for ISE Members<sup>4</sup> to pass through charges from other market centers.<sup>5</sup> The changes made pursuant to SR-ISE-2010-55 became operative on June 1, 2010.

In its capacity as a member of ISE, DECN currently serves as an introducing broker for the non-ISE Member subscribers of DECN to access EDGX and EDGA. DECN, as an ISE Member and introducing broker, receives rebates and is assessed charges from DECN for transactions it executes on EDGX or EDGA in its capacity as introducing broker for non-ISE Members. Since the amounts of charges were changed pursuant to SR-ISE-2010-55, DECN wishes to make corresponding changes to the amounts it passes through to non-

<sup>3</sup> This fee filing relates to the trading facility operated by ISE and not EDGA Exchange, Inc. and EDGX Exchange, Inc. Direct Edge ECN LLC (EDGA and EDGX) will cease to operate in its capacity as an electronic communications network following the commencement of operations of EDGA Exchange, Inc. and EDGX Exchange, Inc. as national securities exchanges.

<sup>4</sup> References to ISE Members in this filing refer to DECN Subscribers who are ISE Members.

<sup>5</sup> On June 1, 2010, in SR-ISE-2010-55, the Exchange increased the "Q" flag from \$0.0018 to \$0.0020 per share to more closely reflect the costs of removing liquidity from the NYSE. By way of background, on May 1, 2010, in SR-ISE-2010-37, the Exchange amended the fees for orders that either route or re-route to the NYSE in response to an increase in NYSE's fee for removing liquidity to \$0.0021 per share (from \$0.0018 per share). As part of that amendment, the "Q" flag, which denotes an order type (ROUC) that routes to the NYSE, was increased from \$0.0015 per share to \$0.0018 per share on EDGA and EDGX to reflect the increase. See Securities Exchange Act Release No. 62050 (May 6, 2010), 75 FR 27029 (May 13, 2010) (SR-ISE-2010-37).

ISE Member subscribers of DECN for which it acts as introducing broker. As a result, the per share amounts that non-ISE Member subscribers receive and are charged will be the same as the amounts that ISE Members receive and are charged.

ISE is seeking accelerated approval of this proposed rule change, as well as an effective date of June 1, 2010. ISE represents that this proposal will ensure that both ISE Members and non-ISE Members (by virtue of the pass-through described above) will in effect be charged equivalent amounts and that the imposition of such amounts will begin on the same June 1, 2010, start date.

###### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,<sup>6</sup> in general, and furthers the objectives of Section 6(b)(4),<sup>7</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, this proposal will ensure that dues, fees and other charges imposed on ISE Members are equitably allocated to both ISE Members and non-ISE Members (by virtue of the pass-through described above).

##### B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

##### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

#### III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

<sup>6</sup> 15 U.S.C. 78f.

<sup>7</sup> 15 U.S.C. 78f(b)(4).

<sup>10</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.